STATE OF MICHIGAN

COURT OF APPEALS

KATHY ISHAM and DANIEL CLARK,

Plaintiffs-Appellees,

v

PAULA HART,

Defendant-Appellant.

UNPUBLISHED
September 29, 2009

No. 286726
Shiawassee Circuit Court
LC No. 07-006398-CH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's July 3, 2008, order of judgment in which plaintiffs were awarded damages following entry of a default judgment against defendant. The trial court awarded plaintiffs damages, including attorney fees, due to defendant's erection of a fence on plaintiffs' land. The central issue on appeal is whether the trial court abused its discretion in awarding the attorney fees. We reverse in part and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed suit seeking to force defendant to remove a fence she erected on their land. Although defendant reports that she was considering the possibility that she had a valid adverse possession claim, she in fact failed to answer the complaint, and a default judgment was entered. Defendant was advised that any motion to set aside the default judgment would be conditioned on her paying $1,000 against plaintiffs' attorney fees. Defendant paid that amount, but never filed the motion. She did, however, participate in the hearing on damages.

The trial court delivered its findings with respect to plaintiffs' entitlement to and calculation of damages from the bench:

> [T]hat the fence was initially put up in early 2007 by the Defendant . . . in good faith. . . . [A]lthough she may not have obtained a survey to . . . make a determination as to where the fence was to be, that . . . there was no intentional trespass on the part of the Defendant.
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> Negligence, in that regard, would not necessarily arise to intentional trespass. That the Defendant was subsequently advised that the fencing was on the Plaintiff's property. That . . . the Defendant was thereafter advised, . . . by the

survey, first by the Plaintiffs and then on their own, another survey, that those surveys were in agreement that the fence that Defendant erected was encroaching upon the Plaintiff's property. And that, thereafter, the Defendant had the opportunity to remove the fence and to save the . . . Plaintiffs the further expense . . . of litigating the issue.

To what extent the Defendant believed that she had . . . any defenses arguably is unclear inasmuch as the Defendant never filed any response or pleading or filed an answer . . . .

* * *

Now, . . . the Court finds that the fence obviously was put up wrongfully in the sense that it was on the Plaintiff's property. The fence eventually was removed, but only after this lawsuit was filed. . . .

* * *

The Court then further finds . . . that the property that's at issue is not improved property, meaning that there are no buildings . . . . Further, that there were no growing crops on the property that the Defendant used for purposes of a fenced-in area for purposes of a horse pasture.

. . . The fencing encroachment is 7.7 feet on the Plaintiff's property and, on the southerly-most portion of Plaintiff's property, the encroachment is 19 feet. . . .

* * *

In terms of the issue of damages then, we have a statute which is [MCL 600.2918(1)]. . . . "Any person who is ejected or put out of any lands or tenements in a forceful and unlawful manner or being out is afterwards held and kept out by force, if he prevails, is entitled to recover three times the amount of his actual damages or $200, whichever is greater, in addition to recovering possession."

* * *

So, in terms of damages requested then, the Court finds, again, . . . no improvements on the property, there's no growing crops, and I think it's been described as scrub land, though that may be a little bit harsh. I think that, for the record, the Court will find that the purpose of the property that's encroached upon by the Defendant would be for hunting purposes. . . . So there's no rental figure that, for example, the Plaintiffs would use to rent out or to have the enjoyment and pleasure of using one's own land for hunting purposes.

* * *

. . . I think what we have is a trespass that is, in first, unintentional; and then there was given the opportunity to remove it; and so does that then become

> intentional trespass? Probably yes. So what are the damages that Plaintiffs are entitled to on that issue?
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> . . . I think that, in looking at the use of the land before and after that there is, in terms of monetary value, I would award $500 to the Plaintiffs.
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> I think that the Plaintiffs are also entitled to costs of the survey. I think that's reasonable, and I'll go ahead and award an additional $1,900 for the cost of the survey to the Plaintiffs.
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> * * *
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> I'll award the attorney fees that are requested, which is . . . $9,042 less the credit of $1,000 paid by the Defendant. . . . So the Plaintiff is awarded then $500 just for the loss of use of the property. And, again, what goes into that is that, after the notice and after the survey, certainly we have an intentional trespass. And the court feels $500 adequately compensates the Plaintiff for the loss of use of their property. Plus the $1,900 for the survey plus the . . . $8,042 . . . . And the sum total of those three figures is the damage figure that Plaintiffs are awarded.

The trial court clarified that the sum total of its assessment for plaintiffs' loss of use of the property, the cost of plaintiffs' survey, and plaintiffs' attorney fees constituted what the court deemed to be plaintiffs' actual damages, which the court expressly declined to treble. The issue before us is whether the trial court awarded the attorney fees on a proper basis.

We review a trial court's decision whether to award attorney fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

It is well settled in Michigan that "[a]wards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

Defendant notes that the trial court did not explicitly find that her claims or defenses were frivolous, and asserts that the court must have awarded attorney fees on the basis of an intentional trespass. Plaintiffs in turn characterize the award of attorney fees as exemplary damages, warranted where a party "acts maliciously, and under a claim which she knows to be false, for the purpose of vexing and harassing plaintiff."

In its ruling, the trial court cited MCL 600.2918(1) in reference to a person's entitlement to damages where he or she is "ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force." Although MCL 600.2918(1) provides that an aggrieved party is entitled to "3 times the amount of his actual

damages or $200.00, whichever is greater," the statute is silent with regard to attorney fees. Actual damages are distinct from attorney fees and costs. See *McManamon v Redford Charter Twp*, 256 Mich App 603, 609; 671 NW2d 56 (2003).

In *Ten Hopen v Walker*, 96 Mich 236, 240; 55 NW 657 (1893), our Supreme Court held that "where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable." We read *Ten Hopen* as recognizing the propriety of exemplary damages in response to not necessarily an intentional trespass, but to willful and malicious conduct, whatever the cause of action. That principle now has expression in the court rules and the Revised Judicature Act, MCL 600.101 *et seq*. In its ruling, the trial court concluded that while defendant's initial act of erecting the fence was unintentional, the trespass became intentional when defendant refused to remove the fence after surveys were conducted verifying that it was not her land. The trial court also indicated, however, that it was unclear whether defendant believed she had good faith defenses. At no point did the trial court expressly state that defendant acted maliciously.

MCR 2.114(E) includes reasonable attorney fees among the sanctions available for violations of certain pleading rules, and MCR 2.114(F) indicates that those sanctions may come to bear in response to a party who pleads a frivolous claim or defense.

MCL 600.2591(1) provides as follows:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

A claim is frivolous if "(1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit."[1] *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266-267; 548 NW2d 698 (1996), citing MCL 600.2591(3)(a). Those criteria logically apply to frivolous defenses as well. In its ruling, the trial court did not expressly state whether defendant violated a pleading rule or pursued a frivolous defense, although it did state that defendant "had the opportunity . . . to save . . . Plaintiffs the further expense . . . of litigating the issue."

Based upon our review of the hearing transcript, it appears that the trial court may have included attorney fees in its assessment of plaintiffs' "actual damages" under MCL 600.2918(1), caused by defendant's failure to timely remove the fence after receiving the results of both plaintiffs' and defendant's surveys. As stated above, attorney fees are not provided for under

[1] "A trial court's finding with regard to whether a claim or defense was frivolous will not be disturbed on appeal unless the finding is clearly erroneous." *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991).

MCL 600.2918(1). Because the trial court either erroneously granted attorney fees under MCL 600.2918(1), or otherwise failed to articulate a proper basis for awarding attorney fees as plaintiffs concede in their brief, we deem it necessary to reverse the trial court's order with respect to attorney fees. We remand this case for further consideration by the trial court as to whether plaintiffs are entitled to attorney fees on proper grounds. Furthermore, because the trial court may have declined to treble damages due to a mistaken belief that it could include attorney fees as part of plaintiffs' actual damages under MCL 600.2918(1), we also deem it necessary to reverse the trial court's decision with regard to treble damages. The trial court is free to reconsider its decision regarding plaintiffs' entitlement to treble damages under MCL 600.2918(1).

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering